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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANTHONY SOARES, Defendant and Appellant.	F078992 (Super. Ct. No. 18CR-01063) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Carol K. Ash, Judge.

Bradley Bristow, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

INTRODUCTION

Appellant Robert Anthony Soares was convicted of felony driving of a vehicle without consent (Veh. Code, § 10851, subd. (a);[1] count 1), and misdemeanor resisting, delaying, or obstructing a peace officer (Pen. Code, § 148, subd. (a)(1); count 2) after he drove a short distance in a truck belonging to his family's dairy farm. He admitted to enhancements (Pen. Code, § 666.5) for having a prior felony conviction for vehicle theft (§ 10851), and for having suffered a prior prison term (Pen. Code, § 667.5, subd. (b)) for the same offense (§ 10851). He was sentenced to the upper term of four years on count 1, with an additional one-year term for the prior prison term enhancement. He was sentenced to a one-year term on count 2, to run concurrently.[2] The court additionally imposed various fines, fees, and assessments.

On appeal, appellant contends (1) count 1 must be reduced to a misdemeanor in light of Proposition 47 and our Supreme Court's recent decision in *People v. Bullard* (2020) 9 Cal.5th 94 (*Bullard*); (2) the prior prison term enhancement must be stricken in light of Senate Bill No. 136 (2019–2020 Reg. Sess.; Sen. Bill 136); (3) the matter must be remanded for the court to reconsider the imposition of fines and fees; and (4) the abstract of judgment should be corrected to reflect the correct amount of the restitution fine. The People concede all issues.

As we explain, we accept the People's concessions. Accordingly, we reverse the judgment on count 1. We reduce the conviction on count 1 to a misdemeanor and strike the prior prison term enhancement. We remand with instructions for the court to appropriately resentence appellant on count 1, including reconsideration of fines and fees in light of the reduction of count 1 to a misdemeanor. Additionally, we instruct the court

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[1] Undesignated statutory references are to the Vehicle Code, unless otherwise indicated.

[2] Appellant was simultaneously sentenced in two other cases, and received an aggregate sentence of six years eight months.

to correct the abstract of judgment with respect to fines and fees as necessary following reconsideration. In all other respects, the judgment is affirmed.

FACTUAL BACKGROUND

Appellant's sister, Rosalyn G., his brother, David S., and his mother, Rosie S., own and operate a dairy and heifer ranch outside the City of Los Banos. Additionally, appellant's nephew, Jacob G., works at the dairy. Appellant once had an ownership interest in the dairy, but was bought out prior to the incident at issue here. However, appellant's Mercedes had been parked on the heifer ranch for at least a couple of years.

On March 15, 2018, Jacob received a call from his uncle David to go up to the dairy to check on the dairy's red Nissan truck. Jacob went to the dairy and examined the red truck, but did not see anything out of the ordinary. He did not see a bicycle in the back of the truck at that time.

Jacob drove from the dairy to the family's nearby heifer ranch. There, he saw that the doors and hood were open on his personal truck, which was inoperable. As Jacob drove toward the truck, he saw appellant close up the truck and stand nearby. Appellant did not have permission to be on the property or in Jacob's vehicle, or in any vehicles belonging to the dairy. Jacob exchanged a few words with appellant, then pulled around to the other side of a building to call law enforcement and wait for sheriff's deputies to arrive. Jacob also called his mother, Rosalyn. Deputy Adam Kent received the call at approximately 4:30 p.m. and reported to the scene. Another deputy arrived shortly thereafter. By the time Rosalyn and the deputies arrived at the ranch, Jacob no longer knew where appellant was, and neither he nor the sheriffs or his mother could find appellant.

Around 8:00 p.m., Kent was driving patrol near the dairy when he noticed a man near the roadway who matched the description he had been given for appellant and the photo of appellant he had seen earlier in the day. Kent pulled up behind the man and got out to speak with him, and determined he was appellant. Appellant was cooperative.

Kent advised appellant that his family did not want him on the property anymore, and appellant stated he would not go back on the property. They talked for about five minutes and Kent left, driving back toward the direction of the dairy.

At the nearby intersection, Kent noticed a red 1994 Nissan pickup truck parked on the side of the road, approximately a quarter-mile away from the dairy, with no one around. He advised dispatch of the vehicle's license number, and learned that it was registered to the dairy. Kent went back to appellant's location and, as he pulled behind appellant, saw appellant run quickly toward a gate. Kent opened his vehicle door and told appellant to stop. Appellant pulled on the gate aggressively until it opened and, as Kent got to the gate, appellant slammed the gate in Kent's face. Kent eventually detained appellant and appellant apologized for pulling away. Kent placed appellant into his patrol vehicle and drove back to the location of the truck.

There, Kent conducted an interview with appellant that was recorded on Kent's body camera. Appellant told Kent that his car would not start, and that he was on his way to get jumper cables at the time he was stopped by Kent. Appellant stated, "I wouldn't take the truck, it's our truck." He then stated that he grabbed the truck to try to start his car, but that a friend was the one driving. Appellant claimed to be a part owner of the vehicle, then stated that he called his mom about the truck and that she stated, "I don't know, well do whatever you do." Appellant described his sister Rosalyn as "the mean one." He acknowledged that Rosalyn and David would probably say he did not have permission to drive the vehicle. Kent did not confirm with appellant's mother or his brother whether appellant had permission to take the truck.

Kent located a black cell phone inside the vehicle, and a bike in the bed of the truck. Kent recognized the bike as one he had seen earlier in the day on the heifer ranch. Appellant told Kent that the bike belonged to a friend, and that the cell phone "probably" was his. Kent did not find the keys for the truck on appellant or in the truck. Appellant

told Kent the key was in the vehicle when he started it and that he left it in there. Appellant stated that the car stalled out where he left it.

Kent contacted Jacob, and Jacob and Rosalyn came to the location and identified the truck as belonging to the dairy. Rosalyn testified that appellant did not have permission to drive the truck or to be on the property, and that appellant had been so advised.

DISCUSSION

I. Conviction on Count 1 for Driving a Motor Vehicle Without Consent

Appellant was convicted of a felony violation of section 10851, subdivision (a), under the theory that he unlawfully drove a vehicle without the owner's consent. No proof of the value of the truck was offered at trial. Appellant contends that, absent such proof, the evidence was insufficient to support his felony conviction. Additionally, he contends the court erred in failing to instruct the jury that it was required to find the value of the vehicle exceeded $950 before it could find appellant guilty. Based on these defects, appellant contends the conviction must be reduced to a misdemeanor. The People concede the evidence was insufficient to support a felony conviction, and that the conviction therefore must be reduced to a misdemeanor.[3] As discussed below, we accept the People's concession.

A. Applicable Law

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and

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[3] In light of this concession, the People do not address appellant's claim of instructional error.

drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.' [Citation.] To these ends, Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597 (*DeHoyos*); accord, *People v. Martinez* (2018) 4 Cal.5th 647, 651.) Relevant here, the theft or receiving of property worth $950 or less (Pen. Code, §§ 490.2, subd. (a), 496, subd. (a)) was redefined as a misdemeanor. (*DeHoyos*, at p. 597–598.)

Proposition 47 provided for prospective changes to the law and for retrospective relief in the form of a petitioning process for those convicted and serving final sentences, or those who completed their sentences, prior to the measure's passage. (Pen. Code, § 1170.18, subds. (a), (f); *DeHoyos*, *supra*, 4 Cal.5th at pp. 598–599; *People v. Martinez, supra*, 4 Cal.5th 647 at p. 651.)

Section 10851, subdivision (a) provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, … is guilty of a public offense …." Section 10851, subdivision (a) criminalizes " 'a wide range of conduct,' including, but not limited to, vehicle theft." (*Bullard, supra*, 9 Cal.5th at p. 102; accord *People v. Garza* (2005) 35 Cal.4th 866, 876.)

In *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), our Supreme Court considered the relationship between Proposition 47 and section 10851, subdivision (a). The high court concluded that,

> "if the defendant was convicted under Vehicle Code section 10851, subdivision (a), of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession, he has, in fact, 'suffered a theft conviction.' [Citation]. [¶] By its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the

> Vehicle Code section 10851 offense. As noted, [Penal Code] section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is personal property. 'As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' " (*Page, supra*, 3 Cal.5th at p. 1183.)

The court additionally held that taking a vehicle with the intent to *temporarily* deprive the owner of possession did not constitute a theft offense, (*ibid*.), but left open the question of whether such an offense was subject to Proposition 47 relief based on "equal protection or the avoidance of absurd consequences." (*Page, supra*, 3 Cal.5th at p. 1188, fn. 5.)

While this appeal was pending, our Supreme Court decided *Bullard, supra*, 9 Cal.5th at p. 110. Therein, the court concluded that, with the exception of posttheft driving, any driving or taking of a vehicle with the intent to permanently or temporarily deprive the owner of possession qualifies for relief under Proposition 47. (*Bullard*, at p. 110.) The high court summarized its holding as follows:

> "Except where a conviction is based on posttheft driving (i.e., driving separated from the vehicle's taking by a substantial break), a violation of section 10851 must be punished as a misdemeanor theft offense if the vehicle is worth $950 or less. In pre-Proposition 47 cases, where the defendant seeks resentencing or redesignation under Penal Code section 1170.18, the defendant bears the burden of proof to show the relevant facts; in cases arising, tried, or sentenced after Proposition 47 came into effect, the People bear that burden." (*Bullard, supra*, 9 Cal.5th at p. 110.)

Following *Page* and *Bullard*, the courts of appeal have reached differing conclusions regarding the proper remedy for a defendant convicted of a violation of section 10851, subdivision (a) after the passage of Proposition 47, where the prosecutor did not present evidence of the value of the vehicle and the court did not instruct the jury on this element. In some circumstances, courts have examined the issue as a challenge to the sufficiency of the evidence and have held that double jeopardy bars retrial on the felony offense. (E.g., *In re D.N.* (2018) 19 Cal.App.5th 898, 901–904.) In such cases,

the court has held the proper remedy is to reduce the vehicle theft conviction under section 10851 to a misdemeanor. (*In re D.N.*, at p. 904.)

Other courts have examined the issue as a question of instructional error. (E.g., *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856–857 (*Gutierrez*).) Under the instructional error line of reasoning, jury instructions that do not account for the effects of Proposition 47 fail to "adequately distinguish among, and separately define the elements for, each of the ways in which section 10851 can be violated." (*Gutierrez*, at p. 856.) Courts that have adopted this approach suggest that such instructions may present the jury with a legally incorrect theory of guilt (i.e., a felony theft under section 10851 that does not require proof of the value of the vehicle), and a legally correct theory of guilt (i.e., a "nontheft taking or driving offense"[4]). (*Gutierrez*, at p. 857.) Unless the court can affirmatively determine which theory the defendant was convicted under, courts adopting this approach have held that the proper remedy is to reverse the felony conviction and "remand the matter to allow the People either to accept a reduction of the conviction to a misdemeanor or to retry the offense as a felony with appropriate instructions." (*Ibid*.)

B. Analysis

The instant case went to the jury solely on the theory that appellant engaged in felony driving of a vehicle without the owner's consent.[5] The evidence showed that

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[4] *Gutierrez* was decided after *Page*, but before *Bullard*. At that time, it was an open question whether the temporary taking of a vehicle was subject to Proposition 47 relief. (*Page*, *supra*, 3 Cal.5th at p. 1188, fn. 5.) Following *Bullard*, however, there is no "nontheft taking" for purposes of Proposition 47, as any taking—whether permanent or temporary—is subject to Proposition 47 relief. (*Bullard*, *supra*, 9 Cal.5th at p. 110.) Thus, following *Bullard*, the only "legally correct" theory of guilt under section 10851, subdivision (a), that does not require proof of the value of the vehicle is posttheft driving. (*Bullard*, at p. 110.)

[5] Prior to trial, the prosecutor elected to proceed only on the theory that appellant had driven—rather than taken—the family truck, in an apparent attempt to avoid the holding in *Page*, *supra*, 3 Cal.5th at p. 1183, and the requirement to prove the value of the vehicle exceeded $950. Accordingly, the information was amended to remove

appellant drove the truck approximately a quarter-mile until it stalled out, and then he walked away. The parties agree that no evidence was presented regarding the value of the vehicle. The parties also agree that the evidence presented could not have supported a felony conviction for violating section 10851, subdivision (a) under a theory of posttheft driving. Accordingly, the parties agree that the evidence was insufficient to support a felony conviction under section 10851, subdivision (a) under any theory. The People concede this deficiency warrants reduction of the conviction to a misdemeanor.

In this case, the remedy would be the same, even if we framed the issue as instructional error. The jury was instructed that the People were required to prove appellant drove the vehicle without the owner's consent, and with the intent to deprive the owner of possession or ownership of the vehicle for any period of time. The jury was not instructed that the People were required to prove either that the value of the vehicle exceeded $950 or that appellant engaged only in posttheft driving. Considering this deficiency, we are unable to conclude the jury based its verdict on a valid legal theory. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.) Ordinarily, the remedy in such circumstance is to "remand the matter to allow the People either to accept a reduction of the conviction to a misdemeanor or to retry the offense as a felony with appropriate instructions." (*Ibid.*) Here, however, the People have conceded reduction of the offense to a misdemeanor is the proper remedy. There is no purpose in remanding to allow the People to elect to retry the offense as a felony.

For the foregoing reasons, we accept the People's concession. Accordingly, we will reverse the judgment on count 1 and reduce to a misdemeanor the conviction for unlawful driving of a vehicle without consent. We will remand with instructions for the court to appropriately resentence appellant on count 1.

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references to "taking," and to allege only that appellant had driven the vehicle without consent. The prosecutor proceeded on this theory through the conclusion of trial.

II. Prior Prison Term Enhancement

Appellant argues that, in light of Sen. Bill 136, we must strike his enhancement for having suffered a prior prison term. We agree.

Effective January 1, 2020, Sen. Bill 136 amends Penal Code section 667.5, subdivision (b) to make a one-year enhancement pursuant to that statute applicable only to a prior prison term for a sexually violent offense, as defined in Welfare and Institutions Code section 6600, subdivision (b). (See Stats. 2019, ch. 590, § 1.) The People concede appellant is entitled to the ameliorative benefit of this amendment. (*People v. Lara* (2019) 6 Cal.5th 1128, 1134 [a statutory amendment lessening punishment is presumed to apply in all cases not yet final as of the statute's effective date, unless the enacting body clearly indicates to the contrary].) Appellant's prior prison term arose out of a conviction for unlawful driving or taking of a vehicle (§ 10851), with a prior felony theft conviction involving a vehicle (Pen. Code, § 666.5), which does not qualify as a sexually violent offense under Welfare and Institutions Code section 6600, subdivision (b). Accordingly, we will strike the prior prison term enhancement.[6]

III. Fines and Fees

The abstract of judgment includes a $40 court operations assessment (Pen. Code, § 1465.8), a $30 court facilities assessment (Gov. Code, § 70373), a restitution fine in the amount of $1,500 (Pen. Code, § 1202.4, subd. (b)), and a parole revocation fine in the amount of $1,500 (Pen. Code, § 1202.45).[7] Appellant contends that, with the reduction of the offense on count 1 to a misdemeanor, the matter must be remanded for the court to consider whether to stay or reduce the fines and fees because "the seriousness of the

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[6] Appellant filed a motion for judicial notice, asking us to take judicial notice of certain legislative history surrounding Sen. Bill 136. These materials are unnecessary to our disposition. Accordingly, the motion is denied.

[7] As discussed below, there are discrepancies between the abstract of judgment and the court's oral pronouncement regarding fines and fees.

crimes and the length of appellant's confinement time" may have affected the court's initial decisions in this regard.[8]

The People concede that the reduction of count 1 to a misdemeanor warrants reconsideration of the fines and fees imposed in this case. We accept the People's concession.

IV. Correction to Abstract of Judgment

At the sentencing hearing, the court stated it was imposing a "$60 conviction fee and a $40 security fee." The court also stated it was imposing a $300 restitution fine and a $300 parole revocation fine. However, the abstract of judgment imposes a $40 court operations assessment (Pen. Code, § 1465.8), a $30 court facilities assessment (Gov. Code, § 70373), a $1,500 restitution fine (Pen. Code, § 1202.4, subd. (b)), and a $1,500 parole revocation fine (Pen. Code, § 1202.45).

Appellant and the People agree that the abstract of judgment must be corrected to reflect the fines and fees actually imposed by the trial court at the sentencing hearing. We agree that the court's oral pronouncement of judgment controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.) Accordingly, the court will be directed to prepare a corrected abstract of judgment reflecting the fines and fees actually imposed, and as may be modified following the court's reconsideration of fines and fees in light of the reduction of appellant's felony conviction on count 1.

DISPOSITION

The judgment on count 1 is reversed, and the conviction on count 1 for driving a vehicle without consent (§ 10851, subd. (a)) is reduced to a misdemeanor. The prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) is stricken. The matter is

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[8] Appellant also relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 to argue the court was required to assess his ability to pay fines and fees prior to their imposition. In light of our remand for reconsideration on other grounds, we need not, and do not, address this contention.

remanded with instructions for the court to appropriately resentence appellant on count 1, including reconsideration of fines and fees in light of the reduction of count 1 to a misdemeanor. The court is additionally instructed to correct the abstract of judgment with respect to fines and fees as necessary following reconsideration. Following further proceedings consistent with this opinion, the trial court shall issue an amended abstract of judgment and forward it to the appropriate authorities. In all other respects, the judgment is affirmed.

Pursuant to the parties' stipulation, the remittitur in this proceeding shall issue immediately. (Cal. Rules of Court, rule 8.272(c)(1).)